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ABSTRACT

This paper traces and analyzes the development of the Supreme Court's work in the area of sexual equality, with particular emphasis on the family dimension of this issue. The Court is criticized for both the legal and policy inadequacies of its recent decisions. It is argued that the Court has failed to use a consistent, principled standard by which legitimate and illegitimate sex-based classifications can be distinguished from one another. The Court is also criticized for not recognizing the connection between family structure and sexual equality and as being inadequate in the area of social reform. A possible solution to the problem of supporting both the legal equality of the sexes and the family as a social institution is offered: sex-neutral, role-specific classifications to replace traditional sex-based ones. (Author/JK)

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SEXUAL EQUALITY AND THE FAMILY IN THE SUPREME COURT

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SP 010 614

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TABLE OF CONTENTS

		page
I.	Introduction	1
II.	Judicial Interpretation of the Equal Protection Clause	4
III.	Pre-*Reed* Constitutional Status of Sex-Based Classifications	6
IV.	*Reed* to the Present	7
	A. *Reed*: The Ambiguity	7
	B. *Frontiero*: The Disagreement	9
	C. *Aiello* and *Kahn*: The Hard Cases	10
	D. 1975 and 1976 Terms: The Middle-Tier Approach	13
	E. Summary of Post-*Reed* Development	14
V.	Legal Inadequacies	15
VI.	Policy Inadequacies	19
VII.	A Possible Solution: Sex-Neutral, Role Specific Classifications	24
	Footnotes	28

I. Introduction

In the past decade the resurgent Women's Rights Movement has succeeded in placing the issue of the equality of the sexes high on the agenda of domestic politics. Unlike its Nineteenth century origins, contemporary feminism is characterized by its demand for not just de jure equality but also de facto equality. The demand for de facto equality of the sexes entails fundamental changes in the life experiences of all Americans. The most fundamental appears to be the mass movement of women into all echelons of the American labor force, and a corresponding exodus of women from the predominantly domestic roles associated with the structure of the traditional family. Thus it is the family more than any other institution that lies at the core of the quest for a de facto equality of the sexes. In its traditional form, it is perceived by feminists as perhaps the major impediment to such equality. In a restructured form, it is similarly seen as the key to equality.

To the extent that the contemporary quest for the de facto equality of the sexes has become politically controversial - and the escalating political battle over adoption of the proposed Equal Rights Amendment suggests this is increasingly the case - it is accurate to say that the locus of this controversy has been the family. Traditionalists and conservatives have accused the advocates of de facto sexual equality (as symbolized, rightly or wrongly, by the ERA) of seeking the destruction of the family, a destruction which they predict will lead to both social disintegration and widespread personal unhappiness. Feminists have replied that they seek not the destruction but the restructuring of the family, a restructuring which will promote (at least in the long run) more humane and happy family relationships. At a minimum, the current controversy reflects a very significant change and division of public opinion over the proper role of women and the structure of the family.

Recent years have also reconfirmed the truth of Tocqueville's observaton that in the United States almost all political controversies sooner or later become legal-constitutional controversies. The issues raised by the Women's Rights Movement have been no exception. Individual litigants, usually with the financial and legal support of organized feminist and civil liberty groups, have been able to successfully raise the issue of unconstitutional sex-based discrimination under the Equal Protection Clause of the Fourteenth Amendment. Nearly all these cases have involved challenges to sex-based legislative classifications. In turn, in nearly all these classifications sex has been used as a proxy to designate the particular family role or function of child-rearing or wage-earning. That is, legislatures in the past have assumed that these two constituent functions of the family are sex-unique, and that in protecting or promoting such functions, it sufficed to designate the sex of the spouse traditionally associated with the function. Thus entitlement to benefits designed to support the child-rearing, home-making function were limited to wives, mothers, and widows. Conversely, entitlement to benefits designed to support the wage-earning function were often limited to husbands, fathers, or widowers. This practice was generally acceptable so long as socio-economic reality conformed to these traditional archetypes and their legitimacy was not itself suspect.

In recent years however, it has been the very legitimacy of these archetypes (i.e. "stereotypes") that contemporary feminism has (quite successfully) challenged. As noted above, it is precisely their continuation, both legally and socially, which is perceived as the major obstacle to the eventual achievement of any <u>de facto</u> sexual equality. In deciding these cases, the Supreme Court has thus been forced into the position of a supreme social arbiter and quasi-social planner, deciding (knowingly or not) the legitimacy or illegitimacy of the characteristic sexual archetypes of the traditional family.

This paper traces and analyzes the development of the Supreme Court's work in the area of sexual equality, with particular emphasis on the family dimension of this issue. The Court is criticized for what are deemed to be both the legal and policy inadequacies of its recent decisions. It is argued that the Court has failed to fulfill its primary judicial responsibility of articulating a coherent, consistent, principled standard by which legitimate and illegitimate sex-based classifications can be distinguished from one another. On a policy level, the Court is criticized for its failure to explicitly recognize the family issue implicit in these cases, and thus its subsequent failure to appreciate the true character of both the individual stakes of the particular litigants involved as well as the broader social consequences of their decisions. A possible solution is suggested, one that would largely resolve the legal dimension of the issue, and return its more overtly political aspects back to the legislative arena. It is suggested that not only would this approach be more consistent with the theory of majority-rule democracy, but that the flexibility and comprehensiveness inherent in the legislative(as distinct from the judicial) process augurs for a more satisfactory resolution of the sexual equality issue.

II. Judicial Interpretation of the Equal Protection Clause

In order to fully appreciate the Supreme Court's work in the area of sexual equality, one must have some knowledge of the constitutional clause under which the issue arises, and the principles by which the Court construes this clause. The majority of sex-discrimination cases have arisen under the Equal Protection Clause of the Fourteenth Amendment.[1]

The Fourteenth Amendment declares, inter alia, that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Exercising its traditional power of judicial review, the Supreme Court reviews both state and federal [2] statutes and decisions for conformance to this constitutional command. The immediate and specific purpose of this amendment, adopted subsequent to the Civil War, was to protect recently freed Negroe slaves from racially discriminatory state laws and practices.[3] With respect to this specific purpose, it remained generally ineffective until the Court's landmark 1954 decision of Brown v. Board of Education. However, through case law development the clause gradually acquired broader scope and more expansive meaning. From a relatively early date it was interpreted to mean not just equal application of the laws but equal laws as well.[4] It was also interpreted as protecting minorities other than Negroes.[5]

By the end of the Warren Court era, and largely due to decisions made by that Court, equal protection analysis had crystallized into what has come to be known as the "two-tier" approach.[6] The upper tier "strict scrutiny" test is applied whenever a "suspect classification" is used in a contested statute.[7] Race is the preeminent suspect classification, but alienage and national origin are also considered suspect. The strict scrutiny test presumes such classifications unconstitutional and strikes them down unless a "compelling state interest" is shown to require them.[8] This test has been accurately described as "strict in theory and fatal in fact."[9] In the absence of such suspect classifications

the lower tier rational basis test is applied. This test nominally requires that a classification be "reasonable" and rationally related to the purpose of the statute.[10] However in practice great deference has been paid to the legislative determination of these issues, and the test has been characterized as providing "minimal scrutiny in theory and virtually none in fact."[11]

Equal protection litigation has thus acquired an "all or nothing" character, where the outcome depends on whether or not the statutory classification is "suspect." Accordingly, legal attention and political controversy have come to focus on this threshold issue. While the Warren Court was largely responsible for the development of this rigid, two-tier approach to equal protection analysis, its actual development of the fatal suspect classification category was much more limited than the implications of that term suggested. The result was the creation among legal activists of what has been aptly described as a "legacy of expectations."[12] The question began to be asked why classifications based on sex were treated differently than those based on national origin and alienage.

Given the traditionally political character of the Supreme Court's exercise of judicial review and the dynamic character of the new Equal Protection analysis, it was inevitable that some of the political issues raised by the resurgent feminist movement of the Sixties and Seventies would find their way to the Supreme Court. In 1971 the first such case, Reed v. Reed, was decided. It has come to be regarded as a landmark case. To appreciate its full significance, however, requires a familiarity with the line of precedents from which it departed.

III. Pre-Reed Development

There are only a handful of sex discrimination cases decided by the Supreme Court prior to the 1970s. This seems to reflect both a widespread consensus about the legitimacy of sexual differentiation in the law, as well as the singular lack of success of those who challenged such distinctions. The significance of these cases lies in the rule of law which they established and the obiter dicta which support this rule.[13]

These cases established that the rule of law to be applied to sex-based classifications was the minimal scrutiny, rational basis test. The first of these cases was the 1908 case of Muller v. Oregon.[14] Muller was contesting the constitutionality of Oregon's newly enacted limitation on the number of hours women could work. Oregon's statute was challenged not as a denial of equal protection but as infringing the individual woman's constitutional right to freedom of contract.[15] Its significance lies in its obiter dicta. The protective classification was judged to be reasonable as reflecting certain social and thus politically significant differences which were perceived as stemming from the fact of sex alone. In particular the Court noted the salutory social effects of the maternal role of women in society and thus the legitimacy of the state's effort to protect this role.[16]

In the more recent case of Goesaert v. Cleary[17] the Court reconfirmed the legitimacy of the perception of women as fulfilling a unique and important role in society. It also established a caveat against undue judicial interference in the legislative determination of sex-based classifications, deeming it a proper exercise of the states' inherent police power to promote the physical and moral wellbeing of their communities. As recently as 1962 in Hoyt v. Florida, the Court upheld the practice of automatic jury list exemptions for women. The Court asserted that the reasonableness of this classification rested on the correct perception of woman as

the "center of home and family life," and explicitly distinguished it from the stigma which attached to differential treatment on the basis of race.[18]

At the end of the Warren Court era sex-based classifications thus seemed securely entrenched within the confines of the minimal scrutiny, reasonable basis test. And so long as the legitimacy of the traditional family, and thus the predominantly domestic roles it assigned to women, remained intact, sex-based classifications seemed destined to remain beyond the reach of equal protection challenges.

IV. Reed to the Present

A. Reed: The Ambiguity

It is not an exaggeration to say that in the past six years the Supreme Court has reversed, in practice if not in theory, both the substantive and procedural principles of the precedents summarized above. This remarkable "revolution" begins with the 1971 case of Reed v. Reed.[19]

The significant aspect of the Court's decision in Reed is its novel application of the traditional rational basis test for sex-based classifications. The brief for the appellant argued at length that sex should be declared a "suspect classification" analogous to race, and thus presumed unconstitutional. In his opinion for a unanimous Court, Chief Justice Burger began by declaring that a sex-based classification such as the one before the Court mandated the application of the rational basis

test. This was in keeping with the precedents and seemed to doom Sally Reed's claim to certain defeat. The Chief Justice identified the purpose of the classification (administrative efficiency) as "not without some legitimacy," apparently terminating the Court's inquiry. However, in what at the time appeared a redundant and rhetorical question, he then proceeded to identify the "crucial question" as "whether section 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause." He concluded that it did not:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause.[20]

While such "mandatory preference" may have been contrary to the Equal Protection Clause (since the Court said it was), it was certainly not contrary to the lower tier "rational basis" test as it was traditionally applied. As one observer noted,

> Only by importing some suspicion of sex-related means from the new equal protection area can the result be made entirely persuasive. Yet application of the new equal protection criteria is precisely what Reed v. Reed purported to avoid.[21]

Had the Court over-ruled precedent, sub silentio, or had it erred in its application of the "rational basis" test? Reed is ambiguous on this crucial point.

b. Frontiero: The Disagreement

Ambiguity (and the unanimous opinion it perhaps allowed) turned into disagreement and a plurality opinion in the succeeding sex-discrimination case of Frontiero v. Richardson.[22] While eight out of nine justices agreed that the impugned statute violated the equal protection mandate, they did not agree on why. The locus of their disagreement was precisely the issue on which Reed was ambiguous: is sex a "suspect" or ordinary classification?

A plurality opinion written by Justice Brennan accepted the appellant's argument and declared sex to be a "suspect" classification. He argued that by process of elimination Reed "implicitly supports" such a holding, since the "rational basis" test alone could not have overturned the Idaho statute. This was buttressed by a more substantive argument that the United States has a legacy of invidious sex discrimination analogous to its legacy of racial discrimination, and therefore "strict scrutiny" of all sex-based classifications should be mandatory.

Only Justice Rehnquist found the statute to be constitutional. He also cited Reed as the controlling precedent, accepting its face value assertion of applying the "rational basis"test. Between these two extremes a pragmatic middle ground was struck by the four remaining justices, who also cited Reed as controlling. They found

the statute unconstitutional but rejected the argument that sex is a "suspect classification." They maintained that Reed was sufficient to support their decision, and that it was unnecessary and imprudent to characterize sex as suspect "with all the far-reaching implications of such a holding." [23] Moreover Justice Powell's concurring opinion took judicial notice of the pending Equal Rights Amendment and argued that:

> ...reaching out to preempt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes. [24]

Frontiero thus makes explicit the ambiguity of the Court's reasoning in Reed but hardly resolves it. But while serious disagreement is evident with respect to the rule of law to be applied to sex-based classifications, eight out of the nine justices show themselves willing to strike down sex-based statutory classifications. In terms of results, Reed and Frontiero taken together were perceived as creating "momentum in a new direction," a direction much applauded by feminists. [25]

c. Aiello and Kahn: The "Hard Cases"

In the 1974 term the Supreme Court handed down decisions in two cases which halted at least temporarily the "momentum" created by Reed and Frontiero. In Geduldig v. Aiello [26] the Court upheld California's exclusion of normal pregnancy from the list of disabilities covered by its Disability Insurance Program. In Kahn v. Shevin [27]

the Court upheld a Florida "widows only" property tax exemption which was challenged by a widower. In both cases the challenged statutes were alleged to discriminate on the basis of sex, thereby denying the equal protection of the laws, but a divided Court did not agree.

The status of these two cases is extremely important. They can be interpreted in either one of two ways. They may be understood as isolated and idiosyncratic aberrations from an otherwise unbroken line of cases which have struck down sex-based classifications. This is how they are generally perceived in feminist legal circles. Professor Ginsburg has labelled them "hard cases," perhaps "the wrong case(s) brought to the Court at the wrong time." [28] She characterizes Kahn as a "'state tax case' that may not carry over into other areas." Aiello is described as the "most troublesome recent decision" because the pregnancy issue is "of critical importance to achievement of genuine equal opportunity for women." However, it is pointed out that the same issue has been resolved in favor of the feminist perspective by EEOC guidelines, which in turn have been upheld in lower federal courts. It is thus suggested that it too was brought to the Court too soon and is "destined to return for another airing at another term." [29] From this perspective Kahn and Aiello are annoying but temporary "setbacks" reflecting more the conservative bias of the justices than any inherent problem with the principle of equal (identical) rights for men and women. [30]

There is an alternative interpretation of these two cases that reaches very different conclusions. Both cases involve laws which directly support and stabilize the family, or more specifically, the traditional family roles of male wage-earner and female home-maker. This of course is why they were challenged as sex discriminations. The "widows only" classification in Kahn directly supports the female home-maker role. In Aiello the classification supports the male wage-earner role. In both cases, to strike down the classifications would be to strike down state efforts to stabilize the family qua social institution. Unlike the prior cases, in Kahn and and Aiello the demand for equal (identical) rights collides with the legal support of the traditional family structure. While this policy consideration does not explicitly figure in the majority opinion of either case, this does not mean that it did not figure in the actual decision. It is standard or even proper judicial practice to avoid explicit policy considerations in favor of more formalistic, legal argument.

From this perspective Kahn and Aiello represent far more than passing idiosyncrasies. Rather they reveal a fundamental tension between a radical equality of rights between the sexes and traditional state support of the family. To the extent that the preservation of the latter is an important social and political objective, then the

very idea of a radical legal equality of the sexes becomes problematic. This important consideration will be pursued further in section VI below.

d. 1975 and 1976 Terms: The "Middle Tier" Approach[31]

The 1975 and 1976 terms have seen the Court extend and even formalize its pragmatic approach to sex-based classifications. It resumed striking down nearly all the sex-based classifications which came before it, but still failed to elaborate a rule of law to support these decisions. No attempt was made to lay down objective criteria for distinguishing acceptable and unacceptable sex-based classifications. The 1974 term witnessed continuing disagreement over what rule of law was established by Reed: rational basis, inherently suspect, or an ambiguous middle ground. By 1975 the Court "solved" this problem by agreeing that its disagreement was not that important. In Stanton v. Stanton a more candid but no more principled Court declared with near unanimity (8-1):

> We find it unnecessary in this case to decide whether a classification based on sex is inherently suspect. ... Reed, we feel, is controlling here. ... We therefore conclude that under any test - compelling state interest, or rational basis, or something inbetween - (the contested statute) does not survive an equal protection attack.[32]

The Court's most recent sex discrimination decision, Craig v. Boren, generated seven different opinions while striking down an Oklahoma sex-based classification by a 7-2 margin. Justice Powell's candid, almost apologetic footnote most accurately describes the current state of the law:

> As is evident from our opinions, the Court has had difficulty agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. ... As has been true of Reed and its progeny, our decision today will be viewed by some as a "middle-tier" approach. While I would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential "rational basis" standard of review takes on a sharper focus when we address a gender-based classification.[33]

e. Summary of Post-Reed Development

The preceeding review demonstrates the extent to which the Burger Court has effectively reversed the substance if not the form of the pre-Reed precedents. The consistent overturning of sex-based classifications beginning with Reed belies the nominal continuity on the doctrinal level. There is indeed, as Justice Powell states rather euphemistically, a"sharper focus" to the post-Reed rational basis test. What the Court once perceived as "natural" differences[34] between men and women have been ascribed to the effects of "the role-typing society has long imposed." [35] Protective legislation for women has been described as "discrimination ... rationalized by an attitude of "romantic paternalism' which, in practical effect, put women not on a pedestal but in a cage."[36] Whereas in 1961 Justice Harlan stated that sex-based classifications "in no way resemble those involving race or color," [37] in 1973 Justice Brennan declared that "throughout much of the Nineteenth century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War codes."[38] In 1961 the Court recognized

the legitimacy of automatic jury exemptions based on the perception of woman as the "center of home and family life." [39] Fourteen years later Justice White cites statistical evidence as either qualifying or rebutting the legitimacy of this premise in the same context.[40] Not all of these more recent obiter dicta have the support of a majority of the Court. However, when coupled with the substantive results of the Court's decisions beginning with Reed, they indicate that the Court has significantly if not radically altered the constitutional status of sex-based classifications over the past six years.

V. Legal Inadequacies

The preceding review reveals that the Court has fallen into a dilemma with respect to its equal protection analysis of sex-based classifications. For what may properly be deemed policy or political reasons, the Court is no longer content to apply the minimal scrutiny rational basis test nor the strict scrutiny suspect classification test. Instead it has reverted to a rather nebulous "middle tier" approach which fails to elaborate any intelligible and consistent standards by which to differentiate legitimate and illegitimate sex-based classifications. While pragmatically very useful, its open-ended discretion and inherent lack of any consistent principle condemn this approach as violating one of the most basic canons of legal interpretation: that judicial decisions be principled.[41] Thus while the Court seems to have deemed the

use of both lower and upper tier equal protection analysis unacceptable for policy reasons, its innovative middle tier approach is unacceptable for jurisprudential reasons.

In order to understand the Court's dilemma it is helpful to understand the rationale behind the two tier approach to equal protection analysis.[42] Two tier analysis may be seen as a response to two traditional rules of jurisprudence. On a formal level, a judicial decision must be "principled" not ad hoc. Traditional two tier analysis accomplishes this with almost syllogistic perfection. A classification "automatically" falls or stands depending on its status - suspect or otherwise. On a substantive level, the exercise of judicial review must accomodate itself to the theory and practice of representative democracy. The Court's decisions must "square" in some rough sense with the beliefs and opinions of a majority of the people, or more specifically with that majority view as it is articulated by the elected representatives of the people. Stated most simply, the Court cannot persist in striking down as unconstitutional legislative classifications which a determined majority perceive as both legitimate and necessary.

Ideally, two tier equal protection analysis meets both of these rules simultaneously. Classifications which are widely and strongly perceived as unjust and unnecessary fall into the upper tier classification of "suspect"

and then, through a simple syllogism, are found unconstitutional. Conversely, classifications which are widely and strongly perceived as legitimate and necessary fall into the lower tier category and easily pass its minimal scrutiny test. In this manner, the two tier equal protection analysis presents itself as principled while at the same time reconciles itself to the theory and practice of representative democracy.

It should be noted that chronologically if not logically, the political consideration is primary. The Court's perception of the legitimacy or illegitimacy of a classification determines which test it must pass. The upper and lower tier categories may be said to represent a formalization of cohesive and strong public consensus for or against the legitimacy and thus the use of certain classifications. This being the case, it is evident that the proper functioning of two tier analysis presupposes and depends upon the existence of a rough but ascertainable public consensus with respect to any particular classification.

With the use of the preceding analysis we can now diagnose the source of the Court's current predicament with respect to sex-based classifications. The problem stems from the lack of any strong public consensus about the legitimacy or illegitimacy of sex-based classifications. As noted above, the two tier approach presupposes precisely such a consensus, either pro or con. Until the late 1960s

such a consensus existed in support of sex-based classifications, and thus the lower tier test was perfectly viable. However, contemporary public opinion no longer perceives sex-based classifications as either simply innocuous or as prima facie invidious like race. With no ascertainable and clear cut public consensus, the "all or nothing" consequences of the two tier approach are unacceptable. The Court has escaped this dilemma, so to speak, by its middle tier approach. This approach very pragmatically allows the Court to strike down most sex-based classifications but allows them to stand in certain "hard cases." The Court thus "squares" itself with public opinion, more or less, but in turn violates the very requirement of principled decision-making which the rigidity of the two tier approach is designed to meet.

VI. Policy Inadequacies

The Court's sex discrimination decisions from Reed to the present are distinguished by their failure to explicitly recognize the family dimension inherent in these cases. This contrasts sharply with pre-Reed precedents, and may indeed be attributable to the Court's desire to break away from this line of precedents. But however understandable the Court's reticence might be, it is not excusable, for it has resulted in a fundamental misunderstanding of the legal character of the conflicts coming before it. The individualistic focus of the Court's scrutiny has blinded it to the fact that the legal conflict is between types of families - traditional and non-traditional - and not between men and women, per se.[43] This blindness has in turn lead the Court to unnecessarily and imprudently denigrate the traditional family, and could potentially lead to decisions whose long term policy effects are inimical to the preservation of the family as a distinctly private rather than a public sphere of human relations.

No case supports this contention more clearly than Weinburger v. Wiesenfeld.[44] This is brought out by asking the following question: Who suffers the constitutional injury, the denial of equal protection, in the Wiesenfeld case? Was it Stephen Wiesenfeld, the plaintiff, who is denied survivors'benefits? Or was it his deceased wife, Paula Wiesenfeld, whose social security coverage was not as comprehensive as a similarly situated male wage-earner's? Or was it Jason Wiesenfeld, their son, who was (legally speaking) denied the equal opportunity for the "personal care and attention" of his surviving parent?

The three opinions handed down in this case alternatively suggest that all three Wiesenfelds are injured by the "mothers only" classification for survivors' benefits. This suggests that when seen in its entirety, it is the Wiesenfeld family that is wrongly injured. And this injury occurs simply

because the Wiesenfelds as a family differed from the traditional family upon which the classification was premised. Quite clearly if Stephen Wiesenfeld had been the family's primary wage-earner and had died, leaving Paula and Jason, there would have been no cause for legal action. This suggests that the real legal conflict is between the traditional family and more recent, untraditional family forms, and not between men and women.

The same conflict can be seen in the "hard cases" of Kahn and Aiello. If Mel Kahn, the widower, had been economically dependent during his married life on his wife's earnings, then, given the rationale of Florida's "widows only" propertytax-exemption, he was logically entitled to the exemption. If however he had been the family's primary "breadwinner" during the marriage, he had no legitimate claim at all. Again, it is the family that has reversed the traditional roles that is discriminated against.

Aiello presents a similar situation. The over-all purpose of California's Disability Insurance Program was to compensate for lost wages and thus to minimize financial hardship. Certainly if Carolyn Aiello or any of the other female plaintiffs in that case were the primary wage-earners for their families, then the financial hardships incident to loss of wages which they suffered due to pregnancy are functionally indistinguishable from any hardships suffered by disabled male "breadwinners." Conversely, if their incomes were merely supplemental and non-essential to their family's economic wellbeing, the legitimacy of their claim is dissipated.

The majority opinion conveniently obscured this dimension of the Aiello case by designating pregnancy as a "sex-unique" characteristic, thereby precluding the logical possibility of unequal protection. (i.e. There is no risk for which men are covered and women are not, nor vice-versa.) The dissenting opinion's "effect analysis" successfully discloses the legal

dissimulation of this argument, but raises in turn an equally serious problem. This dissenting opinion is as oblivious to the family dimension of the case as the majority's. If they had had their way, Justices Brennan, Marshall, and Douglas would simply have declared the pregnancy classification an intrinsic denial of equal protection. Such judicial action, if in a majority, would create additional discernable long-term economic pressures on remaining single-earner families to abandon home-making and childrearing for an additional salary. This potential policy consequence apparently escaped the notice of the entire Court.

The facts and figures supporting this criticism were before the Court in the form of the lower federal court's earlier decision of the same case.[45] Under the existing plan, women workers already received more in benefits (38%) than they payed in premiums (28%). If normal pregnancy were to be included in the coverage, there was a projected increase of $120 to $131 million dollars in benefits paid out, and thus in premiums paid in. This 33% to36% increase in benefits would go solely to women, but the corresponding increase in premiums would be shared equally by all workers, and thus mostly men. Women workers would continue to contribute about 28% of the total premiums, but would then be receiving over 50% of the benefits.

If the Court had ordered California to extend its disability insurance coverage to all pregnancies, this would have resulted in working men (in California) heavily subsidizing the maternity expenses of working women, presumably working wives, and thus (in most instances) the wives of other working men. Meanwhile they would continue to pay for their own families' maternity expenses themselves. Such a program would create indirect but perceptible economic pressure on mothers in traditional single-earner families to choose wage-earning over child-rearing and homemaking, just as the existing program subtly encouraged the opposite trend. Not only would double-earner families have a higher gross income, but one of their major expenses would be eliminated.

Economists are already predicting that in the coming years "there will be strong economic pressures on the remaining single-earner families, who will find themselves increasingly at a competitive disadvantage in terms of standard of living."[46] At stake in the Aiello case is nothing less than the public policy choice of whether or not such a trend should be accelerated. Neither majority nor dissenting opinions give any indication of even recognizing this aspect of the case.

It is important to realize that the central issue here is not which of the two policy choices one prefers, but whether or not such policy choices are appropriate to a judicial body. While conceding that most cases of constitutional law do have some public policy consequences, and that sometimes these may be nearly unavoidable, in this particular instance the policy could be avoided, and avoided without ignoring the legitimate claims of working women who were the material providers for their families.[47]

More generally, the Court's failure to even recognize the potential policy consequences of the Aiello case illustrates unusually well the often remarked (but more often ignored) inadequacies of the Court as an instrument of public policy and social reform. It is the essence of judicial decision-making to reduce the socio-political complex out of which a legal dispute arises to a few, highly abstract questions of law. Its abstract and individualistic focus obscures (intentionally in theory) the larger social and political considerations with which constitutional disputes are always infused. What holds true of judicial policy-making generally is even more true of social reform. The interconnected character of social relationships usually guarantees that a change in one area will produce corresponding changes in related areas, not infrequently more significant than the original. We are becoming increasingly aware that in the realm of social reform today's solution can become tomorrow's problem, and responsible

public policy demands at least the attempt to comprehensively identify possible secondary consequences of any specific social reform. That the Supreme Court in terms of function, personnel, training, and resources, is ill-suited to perform such a task is rather self-evident.

The Aiello case presents a particularly striking example of the problematic character of the Court as a policy-maker, but the same problem inheres in nearly all the sex-discrimination cases. The immediate source of the problem is the Court's inability or refusal to explicitly recognize the family dimension that inheres in the reality of sexual equality. This contrasts sharply with recent literature on the potential impact of the ERA[48] and public policy for families and children,[49] all of which stress the necessary connection between family structure and sexual equality. If the Court is to remedy the deficiencies of its recent sex-discrimination decisions, it must begin by placing its reflections on sexual equality within the context of the concrete social reality of families rather than hypothetical, isolated individuals. After that the Court's role is still ambiguous. The equality of the sexes largely remains an ideal whose concrete social manifestations remain to be worked out. Whether or not, or to what extent, the Supreme Court can play a creative and constructive role in giving practical content to this ideal remains an open question. While its record to date is hardly encouraging, the concluding section of this paper suggests one possibility.

VI. A Possible Solution: Sex-Neutral, Role-Specific Classifications

This paper's analysis of Kahn and Aiello reveals a conflict between the legal equality of the sexes understood as identical rights and traditional state policies designed to support the family qua social institution. The Court's apparent respect for both of these policies[50] accounts for its present dilemma, and the same ambiguity is characteristic of public opinion generally. This section of the paper suggests a possible solution which reconciles both of these apparently conflicting policy considerations. It is based on an explicit recognition of the family dimension which inheres in most sex-based classifications, a recognition which in turn allows for sex-neutral, role-specific classifications to replace traditional sex-based ones. Such an analysis could eliminate most sex-based classifications but without thwarting state efforts to support the family. Such an analysis would require treating sex as sui generis, thus creating a new subdivision of equal protection analysis. This could be done with or without the passage of the ERA.[51]

Taking Aiello and Kahn as paradigmatic, the family dimension can be seen to inhere in nearly all the sex discrimination cases. Like these two cases, Wiesenfeld involves a statute which grants direct financial aid to support the family, in this case the child rearing function.

In Taylor the state offers not financial support but support in terms of exemptions from time consuming public duties. In Reed and Frontiero, by contrast, the presumption of sex-unique family roles is also present but is not used to support such roles. "Administrative convenience" is the only purpose of the classifications in these two cases.

Recognition of the family dimension inherent in these cases allows for a distinction between sex-based classifications which directly support a specific family function and those that do not. If family support were accepted as an "important governmental interest," then those sex-based classifications which were "substantially related to achievement of those objectives" would be acceptable.[52] On the basis of this analysis, classifications like those in Reed and Frontiero whose only purpose is administrative convenience would not be acceptable. By contrast, the sex-based classifications involved in Aiello, Kahn, Taylor, and Wiesenfeld all contribute direct and tangible support to specific family functions - homemaking or wage-earning - and would thus be admissable.

The rule of law applicable to this latter group of classifications could then be further refined by use of the traditional equal protection analytical device of "underinclusiveness."[53] This is essentially what the Court did in Wiesenfeld and could be legitimately generalized

to similar cases.[54] In Wiesenfeld, the Court, after establishing that the purpose of the statute was to provide surviving children with the personal care of a surviving parent, held that it was inconsistent with this purpose to limit financial support to mothers but not fathers. Stated more generally, once statutory purpose is established as the support of a particular family function, the sex of the spouse fulfilling that function is technically irrelevant. Thus, statutory classifications which limit benefits on the basis of sex could be declared unconstitutionally underinclusive, since they do not include and thus treat equally all those who are similarly situated with respect to the functional purposes of the statutes.

The effect of such functional analysis would be to force the rewriting of statutes designed to support the family in sex-neutral but role-specific terms. This would supplant the traditional practice of legislative presumption of sex-unique roles. Benefits would not be distributed or withheld on the distinctions between male - female (Reed, Frontiero, Aiello), father-mother (Wiesenfeld, Taylor), or widow-widower (Kahn, Goldfarb, Webster), but rather on the distinction between primary wage-earner and primary homemaker.

Such an approach would encourage the elimination of sex-based classifications without discouraging legal support for the family and its constituent functions. It would accomodate non-traditional families such as the Wiesenfelds, and thus solve the legal dimension of the conflict. It would avoid decisions that have the inadvertant effect of eroding the economic possibility of single-earner families, and render unnecessary the imprudent rhetoric some of the justices seem to have felt obliged to adopt in order to strike down classifications premised on the traditional family.[55]

To the extent that this approach would still sanction the legitimacy of the legal recognition of a non-salaried domestic role for one of the spouses, and to the extent that this is objectionable to some feminists, it would not solve the political problem. But this is its strength not its weakness. By throwing the more substantive political issue back to the legislatures for resolution, this approach fulfills the criteria of what the late Alexander Bickel has recommended as the "passive virtues" of judicial decision-making.[56] Not only would this approach be more consistent with the theory of majority-rule democracy, but would allow the greater flexibility and comprehensiveness required to adequately deal with the issue of sexual equality.

FOOTNOTES

1. Other issues perceived as important to the achievement of sexual equality have been decided by the Supreme Court under provisions of the Constitution other than theEqual Protection Clause. Most of them also have a significant family dimension, but for reasons of thematic unity have not been considered in this paper. The most important are of course the abortion cases: Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); Planned Parenthood v. Danforth, ___ U.S. ____ (1975). Also important is the child custody case, Stanley v. Illinois, 405 U.S. 645 (1972). Important litigation has also arisen under Title VII of the 1964 Civil Rights Act: Phillips v. Martin-Marietta Corporation, 400 U.S. 542 (1971); Gilbert v. General Electric Co., 97 S.Ct. 401 (1976). A mandatory pregnancy leave requirement has also been successfully challenged on Due Process grounds: Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

2. While the specific wording of the Fourteenth Amendment only prohibits states from denying the equal protection of the laws, the same principle has been held to inhere in the Due Process Clause of the Fifth Amendment, and thus applicable to federal statutes as well.

3. See Alexander Bickel, "The Original Understanding and the Segregation Decision," 69 Harv. Law Rev. 1 (1955).

4. Yick Wo v. Hopkins, 118 U.S. 356,369 (1886).

5. Ibid. For a summary and analysis of equal protection development through 1948, see Tussman and TenBroek, "The Equal Protection of the Laws," 37 Cal. Law Rev. 341 (1949).

6. For a thorough review and analysis of the development of the two-tier approach to equal protection by the Warren Court, see "Developments in the Law - Equal Protection," 82 Har. Law Rev. 1065 (1969).

7. There is a second category of statutes which are subjected to the upper-tier, strict scrutiny test, those which involve what the Court has designated as "fundamental interests." Human reproduction, voting, and equal treatment with respect to criminal procedure have been deemed "fundamental interests" to date. Since this category is generically distinct from "inherently suspect" and has thus far had no impact on the issue of sexual equality, it is not discussed in this paper.

8. This has happened only once - the Japanese relocation case of Korematsu v. U.S., 323 U.S. 214 (1944). Ironically, this was the case that first articulated the inherently suspect, strict scrutiny test in its present form.

9. Gunther, "In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection." 86 Har. Law Rev. 1,8 (1972).

10. In this paper, inherently suspect, strict scrutiny, and upper-tier are used interchangably to refer to the same test. Similarly, lower-tier, rational basis, and minimal scrutiny are used synonymously.

11. Gunther, p. 8.

12. Ibid., p. 11.

13. Strictly speaking, obiter dicta does not support a judicial decision. The holding or rule of law does this. However in equal protection cases the rule of law, whether rational basis or inherently suspect, presupposes and reflects a societal consensus about the legitimacy or illegitimacy of a given basis of classification. The obiter dicta in equal protection cases thus take on an added significance as it both reflects this underlying consensus and reinforces it. Cf. p. 15-18, below.

14. 208 U.S. 412 (1908).

15. This decision occurred during the zenith of the Court's "substantive due process" and freedom of contract era. The Due Process Clause was used to invalidate scores of state attempts to enact protective and regulatory labor legislation, the most infamous of which is Lochner v. New York. The importance of Equal Protection waned while that of Due Process waxed, and now the reverse seems to be the case.

16. "...it will still be true ... that her physical structure and the proper discharge of her maternal functions - having in view not merely her own health but the well-being of the race - justify legislation to protect her from the greed as well as the passion of man." 208 U.S. 412 (1908).

17. 335 U.S. 464 (1948).

18. 368 U.S. 57,61 (1961).

19. 404 U.S. 71 (1971). Sally and Cecil Reed, the appellant and the appellee, were the divorced parents of Richard Reed, a minor who died intestate in 1967. Both parents sought to be appointed administator of their son's estate, which was valued at less than $1000. Both were members of the same entitlement class (parents) specified ...

19. (cont'd.) by the Idaho Code. The Code also specified that when two such applicants are of the same entitlement class, then the male applicant is to be preferred to the female applicant. Pursuant to this, Cecil Reed was appointed. Sally Reed appealed, alleging that the statute unconstitutionally denied her the equal protection of the laws. After losing in the Idaho Supreme Court, she appealed to the federal Supreme Court which upheld her claim.

20. 404 U.S. 71, 75 .

21. Gunther, p. 34.

22. 411 U.S. 677 (1973). This case involved a federal statute establishing procedures for allocating fringe benefits to members of the armed forces. To promote efficiency and economy, spouses of male members were automatically granted dependency status for the purpose of receiving increased benefits, while female members were required to demonstate the dependency of their spouses. Sharon Frontiero, an Air Force officer, was denied increased housing and medical allowances for her non-dependent husband. She then filed suit against the government alleging that the statute denied her the equal protection of the laws. The Supreme Court agreed.

23. Ibid., p. 691-2.

24. Ibid., p. 692.

25. Ruth Bader Ginsburg, "Gender in the Supreme Court: The 1973 and 1974 Terms," 1975 Supreme Court Review 1.

26. 417 U.S. 484 (1974).

27. 416 U.S. 351 (1974).

28. Ginsburg, p. 21. The EEOC guidelines on pregnancy disability insurance reached the Supreme Court in the case of Gilbert v. General Electric, 97 S.Ct. 401 (1976). The Court held that refusal to include pregnancy in a disability insurance program did not constitute sex discrimination as defined by Title VII of the 1964 Civil Rights Act.

29. Ibid., p. 21-22.

30. As Professor Ginsburg states it: "Kahn and Aiello indicate that the Court does not yet fully perceive, or is unwilling to confront, particular gender-based cases presented to it as part of a pervasive design of sex-role allocations shored-up by laws that impede social change." Ibid., p. 22.

31. Taylor v. Louisiana, 419 U.S. 522 (1975).
Weinburger v. Wiesenfeld, 95 S.Ct. 1225 (1975).
Stanton v. Stanton, 95 S.Ct. 1373 (1975).
Craig v. Boren, 97 S.Ct. 451 (1976).

32. 95 S.Ct. 1373, 1377.

33. 97 S.Ct. 451, 464 (1976).

34. 208 U.S. 412 (1908).

35. Justice Blackmun in Stanton, 95 S.Ct. 692,700.

36. Justice Brennan in Frontiero, 411 U.S. 677,684.

37. Justice Harlan in Hoyt, 368 U.S. 57,61.

38. Supra, fn. 36.

39. Supra, fn. 37.

40. Justice White in Taylor, 95 S.Ct. 692,700.

41. The famous English jurist Dicey states, or perhaps overstates, this fundamental principle of judicial decision-making as follows: "The duty of a court is not to remedy a particular grievance but to determine whether an alleged grievance is one for which the law supplies a remedy. ... If the Courts were to apply to the decision of substantially the same case, one principle today and another principle tomorrow, men would lose rights that they already possessed; a law which was not certain would in reality be no law at all." More contemporary formulations of this principle may be found in Herbert Wechsler's "Toward Neutral Principles of Constitutional Law," 73 Har. Law Rev. 1; and Alexander Bickel's, The Least Dangerous Branch, ch. 1&2.

42. While there is extensive commentary on the development of the Equal Protection Clause (See footnotes 5,6,&9), I have not found any attempts to formulate a general theory or rationale for the two-tier approach. My own attempt to do so has forced me to appreciate why. Its development and application is so varied as to refute any single generalization. The exceptions tend to destroy the viability of any rule. Nonetheless, the theory elaborated in this paper is valid and useful with respect to sex-based classifications, and would seem to be valid for any further judicial expansion of the suspect classification category.

43. This is not to deny that the ultimate political issue may be between men and women, but only to assert that qua political issue it should be politically not judicially resolved.

44. 95 S.Ct. 1225 (1975). At stake in this case is a section of the Social Security Act which provides that survivors' benefits be granted to surviving mothers but not surviving fathers, all other factors being equal. (i.e. The deceased spouse must be eligible for benefits through previous payments of Social Security taxes and there must be children 18 years of age or younger still in the home. The section was originally entitled "Mothers' insurance benefit," with the stated purpose of "enabling the widow to remain at home and to care for the children." Stephen Wiesenfeld, the plaintiff, had lost his wife during the birth of their first and only child, Jason. Up to that time his wife's work as a school teacher was the principal means of their support. Upon her death, he applied for survivors' benefits for both himself and his newly born son. The request for the child's benefits was granted, but he was turned down according to the "mothers only" classification of the statute. He then challenged this provision as a denial of equal protection. A unanimous Supreme Court agreed, but with three different opinions.

45. 359 F. Supp. 792 (1973).

46. New York Times Magazine, July 4, 1976, p. 28.

47. See section VII, below.

48. See Impact ERA: Limitations and Possibilities, edited by the Equal Rights Amendment Project of the California Commision of the Status of Women, Les Femmes Publishing, (1976) Millbrae, Calif; "A Report by the Ohio Task Force for the Implementation of the Equal Rights Amendment," the Ohio Attorney General's ERA Law Project, Columbus, Ohio (1975).

49. See "Toward a National Policy for Children and Families," Advisory Committee on Child Development, National Academy of Sciences, Washington (1976).

50. The Court's support of the family is only implicit, based on our interpretation of its decisions in Kahn and Aiello.

51. The passage of the ERA would obviously sanction a departure from existing precedents. However the Court could elaborate a new sui generis approach to sex-based classifications without passage. Indeed, it has already done so inspite of itself. It is worth noting that the new rule of law suggested by Justice Brennan in Craig v. Boren could, with little elaboration,do precisely this. See fn. 52.

52. This is an elaboration of Justice Brennan's rule in his Craig opinion: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental interests and must be substantially related to achievement of those objectives."

53. Underinclusiveness is an analytical device occasionally used by the Court in equal protection cases. It will be recalled that the fundamental rationale of the lower-tier, rational basis test is that similarly situated persons are to be treated similarly. The Court is usually very deferential to legislative judgement as to which persons are similarly situated with respect to the purpose of the statute. Occasionally however, it will substitute its own judgement and over-rule the legislative classification as underinclusive, i.e. as not including all persons who share the defining characteristics implicit in the purpose of the classification. Traditionally, the Court has used this device when confronted with a particularly objectionable state statute in order to escape the restraints imposed by the rational basis test. Cf. the mandatory sterilization for crimes of "moral turpitude" case: Skinner v. Oklahoma, 316 U.S. 535(1942).

54. The Court's failure to do this has resulted in a continuing debate over whether such classifications are "benign" or "invidious," a debate which is unresolvable in principle since it is precisely their "benign" character that is perceived as "invidious." For the Court's latest and inconclusive go-around with this issue, see its two social security "widows only" classification cases decided this past term: Califano v. Goldfarb, 97 S.Ct. 1021 (1977) and Califano v. Webster, 97 S.Ct. 1192 (1977).

55. Cf. pp. 14-15, above. With reference to these and other recent obiter dicta of the Court denigrating the traditional domestic role of women in the family. Robert Faulkner has observed: "But need one suppose that all differentiation of the sexes' roles must be fought, or that the contemporary trend is without costs? For it is also true that divorce, shallow sexual relations, juvenile delinquency, and youth violence and crime have grown apace, not least where sound family life is least. Not a word from Brennan or Blackmun on who cares for the family as the mother cares less." "Patron of Equality: The Burger Court and the Equal Protection Clause," paper delivered at the 1975 Annual Meeting of the American Political Science Association, San Francisco.

56. "The Court's first obligation is to move cautiously, straining for decisions in small compass, more hesitant to deny principles held by some segments of society than ready to affirm comprehensive ones for all, mindful of the dominant role the political institutions are allowed, and always anxious to adopt compromises and accomodations before declaring firm and unambiguous principles." The Morality of Consent, New Haven, Yale University Press, p.26. (1975)